FILED
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IN THE

Supreme Court of the United States

1971 - October Term
No.

JEAN VIVAUDOU,

Petitioner,

v.

ROYAL NATIONAL BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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In The

SUPREME COURT OF THE UNITED STATES

~~April Term,~~ 1972

JEAN VIVAUDOU,

Petitioner,

v.

ROYAL NATIONAL BANK OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

TO: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Vivaudou, respectfully prays that a writ of certiorari issue to review a determination of the Appellate Division of the Supreme Court of the State of New York, first department, affirming an order made at Special Term denying petitioner's motion to vacate a default judgment entered May 7, 1957.

Opinion Below

No opinion was rendered by the courts below except for the memorandum opinion of the court at Special Term copy of which is appended hereto. The opinion is not officially reported.

Jurisdiction

The order sought to be reviewed is an order of the Appellate Division of the

Supreme Court of the State of New York, first department, dated and entered September 23, 1971 (37 App. Div. 2d 802). The Court of Appeals of the State of New York dismissed petitioner's appeal from said order taken as of right, by order dated and entered November 18, 1971. (29 N.Y. 2d 822)

Application for leave to appeal to the Court of Appeals was timely made pursuant to Section 5514 CPLR. The order of the Appellate Division became the final determination of the highest court of the state in which a decision of the constitutional question herein involved could be raised within the meaning of 28 U.S.C. 1257 on entry of the order of the Appellate Division denying petitioner leave to appeal on January

13, 1972. (Not reported to date. This petition for a writ is in time pursuant to Rule 22(3) of the Rules of the Supreme Court and 28 U.S.C. 2101 (6) if filed with the Clerk by April 12, 1972. Copies of said orders are appended hereto.

Jurisdiction is asserted under Section 1 of the Fourteenth Amendment to the United States Constitution.

Questions Presented for Review

The basic question presented for review is whether the refusal of a state court to vacate a default judgment for claimed lack of service of the summons and complaint and lack of jurisdiction of the court, deprived petitioner of his constitutional right to due process of law and equal protection of the law

under the Fourteenth Amendment, where the court, without making any determination of the contested jurisdictional fact issue, denied petitioner a hearing and held that he was estopped by laches from showing that the summons and complaint had never been served.

Petitioner's motion to vacate the default judgment raised the constitutional question of the validity of a default judgment entered without service of process (Appendix on Appeal to the Appellate Division, pp A-13, 40, 41). Special Term held petitioner was barred by laches from challenging the propriety of the service.

The appeal to the Appellate Division raised the additional constitutional question of the petitioner's right to a hearing and determi-

nation of the contested question of service of process. The Appellate Division affirmed unanimously without opinion and in effect held that petitioner had not been denied his constitutional rights by the order appealed from.

Constitutional Provisions

Section 1 of Amendment 14 to the Constitution of the United State provides in part as follows :

> ".... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jursidiction the equal protection of the laws."

Statement of the Case and Facts

On November 30, 1970 petitioner moved in

the Supreme Court of the State of New York to vacate a default judgment for $21,089.31 entered on May 7, 1957 in an action instituted in that court by respondent against petitioner. The judgment was based on an affidavit of personal service of the summons and complaint on petitioner in New York city on April 3, 1957.

Petitioner showed that on April 3, 1957 and for several months prior thereto he resided in Puerto Rico where he was engaged in real estate and other substantial business transactions and was not served with process in New York city as claimed by the plaintiff. To support his statements of his recollection of his presence in Puerto Rico and his absence from New York in April 1957, petitioner presented to the

court copies of letters sent by him from San Juan, Puerto Rico, dated April 2, 1957, one day prior to the date of the alleged service, and April 8, 1957, and a credit memorandum issued to his wife dated February 7, 1957 and stated that other similar supporting records were available.

Petitioner's claim of non-service supported by his documentary proof raised a substantial fact question as to the truth of the process server's affidavit and the jurisdiction of the court to enter a default judgment.

Petitioner showed that he had no notice of the institution of the action until January 1967 when respondent first instituted enforcement proceedings under the judgment, and that he was first alerted to the

facts showing the invalidity of the judgment by his attorney in November 1970.

The state court denied petitioner's motion to vacate in an order reading as follows:

> "Defendant moves to vacate a default judgment entered on May 1957, on the ground that he was not personally served with summons and complaint. From the opposing papers submitted, it appears that defendant has been aware of this judgment for approximately thirteen years, and concededly during the past four years he had been involved with plaintiff in enforcement proceedings thereof. Even if this Court were not to charge defendant with gross laches (Broderick

v. Saretsky, 39 N.Y.S. 2d 802) defendant is estopped from challenging the propriety of service in the principal action since he participated in the enforcement proceedings without making any objection thereto. Hence the motion to vacate is denied.

Dated, December 24, 1970."

It is to be noted that the court in denying the motion made no determination of the jurisdictional fact questions and denied petitioner a hearing on the contested question of service. Broderick v. Saretsky, referred to by the court was a decision made after a hearing wherein the Appellate court reversed a referee's finding as against the weight of the evidence and held that gross laches was

a bar to opening up the defendant's default and giving him leave to appear and answer.

As to the factual basis for laches or estoppel the court relied on statements made, as noted in the opinion, in the "opposing papers" and ignored petitioner's specific denial of the truth of those statements. The court concluded that petitioner's "participation" in enforcement without objection barred the granting of relief although such "participation" consisted only of signing stipulations consenting to adjourn examinations which were never held, without awareness of the invalidity of the judgment by petitioner or respondent, and no reliance on such participation or resulting prejudice to respondent was shown.

Reasons for Allowance of the Writ

Petitioner seeks review of the state court order to protect his constitutional right to object to a default judgment entered without service of a summons and complaint.

The question of the jurisdiction of the court to enter the default judgment was submitted to the state court by the motion made by petitioner in the action in which the judgment was entered. That question may be held to have been determined and to be res judicata in any subsequent plenary action, unless the order is reviewed and reversed by this court, even though the state court order was erroneous, the court was in fact and in law without jurisdiction to enter any judgment and the determination itself was made in violation of constitutional procedural restrictions.

American Surety Co. v. Baldwin, 287 U.S. 156

Bonner v. Gorman, 213 U.S. 86, 91

Frazier v. East Baton Rouge Parish School Board
363 Fed (2d) 861, 5th Circ, 1966

In American Surety the court wrote:

"The principles of res judicata apply to questions of jurisdiction as well as to other issues. ... They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. ..." 287 U.S. at 166

See: 47 American Jurisprudence 2d, 275, section 1289 as follows:

"..... a judgment of a state court having the requisite jurisdiction will operate as res judicata and a bar in a federal court. This rule has even been applied to a state court's erroneous adjudication of a federal question which is a bar to a subsequent litigation of such question between the same parties in a diversity case in the federal court....."

Relying on the foregoing citations respondent has contended that the New York order is res judicata in an action filed by petitioner on February 8, 1972 in the United States District Court, Southern District of New York, seeking judgment declaring the New York judgment void, enjoining enforcement and for damages. (Jean Vivaudou, plaintiff, v. Royal National Bank of New York, defendant, File # 72 Civ 574). Respondent has moved to dismiss the action on the ground of res judicata insisting that the petitioner's only remedy is by review of the state court order by this court. (Motion returnable April 25, 1972)

The order sought to be reviewed, to the extent that it may be held to be a final determination that petitioner may not, because of laches, question the jurisdiction of the

court to enter the default judgment or to enforce it, is clearly in conflict with the decisions of this court and deprives petitioner of due process of law.

Griffin v. Griffin 327 U.S. 220, 228-9

Hansberry v. Lee 311 U.S. 32, 40-41

Simon v. Southern Railway 236 U.S. 115, 122

In SIMON the court said, referring to judgments obtained without service of process:

> "Such judgments are not erroneous and not voidable but upon principles of natural justice and under the due process clause of the Fourteenth Amendment, are absolutely void... On principle and authority therefore, a judgment obtained in a suit of which the defendant had no notice, was a nullity and the party against whom it was obtained was entitled to relief." at p. 122

For a similar expression of the rule see Moore, Federal Practice, Section 60.25

(4) as follows:

> "The Theory underlying the concept of a void judgment is that it is legally ineffective - a legal nullity and may be vacated by the court which rendered it at any time. Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life
> .....

The decisions of the New York courts leave no doubt that the state law is in accord.

Ingersoll v. Mangam, 84 N.Y. 622
Korn v. Lippman 201 N.Y. 405, 406
Valz v. Sheepshead Bay Bungalow Corp. 249 N.Y. 122, 132
O'Connell v. Gallagher, 104 App. Div. 492, 495

In Valz the court wrote:

"It is .. urged that the construction of the Constitution is not directly or necessarily involved in this appeal because the decision of the courts below might be based upon a finding of estoppel or laches... The answer to that contention is that the courts below did not and could not find estoppel or laches. There can be no estoppel based upon failure of the non-resident defendants... either to

appear in that action or to take other steps to assert their rights .. unless some duty to act in assertion of their rights was placed upon such defendants. If they received legal notice, which called upon them to assert their rights in the proper forum, then the court had jurisdiction to enter judgment....If they had no such notice, then it seems clear that they were under no duty to assert their rights until they chose to do so, and failure to act earlier, where there was no duty, can create no estoppel. " 249 N.Y. at 132-3

"There is no field for the exercise of discretion where there is no jurisdiction in the court under the statute. " 249 N.Y. at p. 136.

The rule was similarly noted in

O'CONNELL:

"Under such circumstances the defendant was justified in waiting until the judgment was sought to be enforced. The question of laches therefore cannot be considered, as the defendant had the legal right to have this judgment set aside at any time upon it appearing that it had been entered

without actual service of the summons.." (104 App. Div. 492, 495)

Denial of a hearing on the contested issue of service of the summons and complaints and refusal to make a factual determination as to the claim of non-service or the lack of jurisdiction of the court, deprived petitioner also of his constitutional right to a trial by the court, if not by the court and jury, and, since it was in violation of clearly established New York law, deprived petitioner of the equal protection of the law.

Matter of Speranzo, 186 N.Y. 280, 284
General Investing Co. v. Interborough Rapid Transit, 235 N.Y. 133
Kranta v. Salvio, 283 App. Div. 965

Accordingly, because of the substantial conflict of the rule of the state court order with the decisions of this court and because the bind-

ing effect that may be given to the state court order, as claimed by respondent, would result in the loss of petitioner's constitutional rights, if the erroneous determination of the state court is not reversed, the court is respectfully requested to allow review of the order of affirmance of the Appellate Division and to grant the requested writ of certiorari.

Conclusion

Petitioner's application for a writ of certiorari should be allowed.

Dated, New York, N. Y. April 10, 1972.

DAVID SIMON
Counsel to petitioner

ORDER APPEALED FROM

Index #5133 - 1957

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, N.Y. 10007

PRESENT:

HON. BIRDIE AMSTERDAM,
Justice.

ROYAL STATE BANK OF NEW YORK,

Plaintiff,

- against -

Filed Dec. 28, 1970 NY Co Clk's office

JEAN VIVAUDOU

Defendant

The following papers numbered 1 to 20 read on this motion submitted No. 180 on Calender of Dec. 21, 1970

(APPENDIX A)

	Papers Numbered
Filed order to show cause and affidavit annexed and exhibits	1 - 4
Answering affidavit and exhibits	6 - 16
Replying affidavit and exhibits	17 - 20
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Defendant moves to vacate a default judgment entered on May 7, 1957, on the ground that he was not personally served with summons and complaint. From the opposing papers submitted, it appears that defendant has been aware of this judgment for approximately thirteen years, and concededly during the past four years he has been involved with plaintiff in enforcement proceedings thereof. Even if this Court were not to charge defendant with

gross laches (Broderick v. Saretsky, 39 N.Y. S. 2d 802) defendant is estopped from challenging the propriety of service in the principal action since he participated in the enforcement proceedings without making any objection thereto.

Hence the motion to vacate is denied.

Dated: December 24, 1970

Briefs: Plaintiff's ___/___

Birdie Amsterdam
J.S.C.

(APPENDIX A)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of September, 1971

Present Hon: Emilio Nunez, Justice Presiding
" Theodore R. Kupferman
" Francis T. Murphy, Jr.
" Aron Steuer
" George Tilzer, Justices

Royal National Bank of New York formerly known as Royal State Bank of New York.

Plaintiff-respondent

against

Jean Vivaudou

Defendant-Appellant

Affirmance of Order
4123 - N

(APPENDIX B)

An appeal having been taken to this Court by the defendant appellant from an order of the Supreme Court, New York County, (Amsterdam, J.) entered on the 28th day of December, 1970, denying defendant-appellant's motion to vacate a default judgment entered May 7, 1957, and said appeal having been argued by Mr. David Simon, of counsel for the appellant, and by Mr. Sol S. Perlow, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondent.

ENTER:

(Reported, 37 App. Dvi. 2d 802)

HYMAN W. GAMSO,
Clerk

(APPENDIX B)

STATE OF NEW YORK

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of November A.D. 1971

PRESENT, HON. STANLEY H. FULD, Chief Judge, Presiding,

Mo. No. 932

Royal National Bank of New York formerly known as Royal State Bank of New York

Respondent,

vs.

Jean Vivaudou,

Appellant.

(APPENDIX C)

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution

Larry Kimball
Deputy Clerk

(Reported, 29 N.Y. 2d 822)

(APPENDIX C)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 13, 1972

Present Hon. Emilio Nunez, Justice presiding
Theodore R. Kupferman
Francis T. Murphy
Aron Steuer
George Tilzer Justices

Royal National Bank of New York, formerly known as Royal State Bank of New York

M-8336

Plaintiff-Respondent

-against-

Jean Vivaudou

Defendant-Appellant.

(APPENDIX D)

The above named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court on September 23, 1971

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of David Simon in support of said motion, and the affidavit of Sol. S. Perlow in opposition thereto, and after hearing Mr. David Simon for the motion, and Mr. Sol S. Parlow opposed,

It is ordered that said motion be and the same is hereby denied with $10 costs.

ENTER:

HYMAN W. GAMSO
Clerk

(Not reported to date)

(APPENDIX D)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1314

JEAN VIVAUDOU,

Petitioner,

—v.—

ROYAL NATIONAL BANK OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

SOL. S. PERLOW
Counsel for Respondent
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IN THE

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JEAN VIVAUDOU,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Supreme Court of the State of New York, not reported, appears in App. A of Petition.

Jurisdiction

The petition for a writ herein was not timely filed within the time prescribed by 28 U.S.C. 2101, to wit, 90 days from the entry of the order by the Appellate Division which was September 23, 1971, which appears in App. B of Petition. The Appellate Division alone had power to grant leave to appeal (New York CPLR 5602 (b)) and the Court of Appeals on November 18, 1971 by an order which appears in App. C dismissed the petitioner's appeal taken as of right.

The petitioner's motion for leave to appeal to the Court of Appeals, made in the Appellate Division, was not timely made as required by New York CPLR 5513 (c), in that the motion for leave to appeal had not been made within 30 days from the date of service upon petitioner's attorney of the order of the Appellate Division with notice of entry, to wit, September 24, 1971. The Appellate Division denied the petitioner's application for leave to appeal by an order which appears in App. D of the petition.

The time in which to petition for certiorari in this case began 90 days after September 23, 1971; the petitioner's untimely motion for leave to appeal to the Court of Appeals which was denied cannot operate to extend the time within which the petitioner could file his petition.

The time limitation in petitioning for certiorari in this case was December 15, 1971.

Questions Presented

Whether the petitioner, having made a motion to vacate the judgment on the ground that he had not been served with process, and having been defeated, in all of the Courts of New York, could raise that issue again collaterally.

Whether the principles of res judicata apply in this case.

Whether the question of jurisdiction of the New York Supreme Court having been fully and completely litigated, can that question be collaterally attacked.

Whether, assuming en arguendo, that the decisions made by the New York Courts were erroneous, was the petitioner (the unsuccessful party in all of the New York Courts) deprived of his property without due process of law within

the Fourteenth Amendment of the Constitution, where he has been fully heard in the regular course of judicial proceedings.

Whether, there are any special or important reasons shown in the petition for certiorari herein, why consideration should be given to the petition under the provisions of Supreme Court Rule 19.

Statute Involved

Fourteenth Amendment of the Constitution

Statement of the Case

On May 7, 1957 the respondent recovered a judgment against the petitioner in the sum of $21,089.31 in the New York Supreme Court. Service of the summons and complaint was made by one, Herman Kruger, on April 3, 1957. The action was based on guaranties of payment of loans made by the respondent to a corporation of which the petitioner was a principal. The petitioner failed to appear or answer, by reason of which default, judgment was entered against him.

On January 18, 1967 the petitioner, as judgment debtor, was served with a restraining notice and a subpoena *duces tecum*. At the time of such service the petitioner and Sol S. Perlow, Esq., attorney for respondent had a talk in which the petitioner said he was aware of the judgment, recalled having been served with the summons and complaint and that since he had no assets there was nothing the respondent could do to enforce payment of the judg-

ment. He also stated that since he had no defense to the action it would have been useless to engage an attorney.

Several days after the service of the notice to restrain, the petitioner called the respondent's attorney and asked for an adjournment of the examination. Petitioner also requested such an adjournment in a letter to respondent's attorney.

During February 1967, the petitioner called at Perlow's office and told Perlow that he had no assets but would try to borrow some money from his stepmother, Rose Vivaudou, and would try to work out a settlement of the judgment. He further stated on that occasion that the Manufacturers Hanover Trust Company had recovered a large judgment against him and that he was judgment proof.

On December 4, 1968, the appellant was again served with a subpoena *duces tecum*, returnable December 18, 1968. On December 17, 1968, a stipulation adjourning the examination scheduled for December 18, 1968 to February 5, 1969, was entered into and signed by the petitioner as judgment debtor and receipt of a copy of the stipulation was acknowledged by the petitioner.

At the petitioner's request a subpoena served on Grand Maison De Parfums Inc., of which petitioner was president, was adjourned to February 19, 1969.

On June 4, 1970, Vivaudou told Perlow that his stepmother, Rose Vivaudou, had died and that he was a legatee of her estate. A garnishee order was served on the executor of the Rose Vivaudou estate on July 8, 1970.

On July 13, 1970, Perlow again served a subpoena *duces tecum* on the petitioner as judgment debtor. At the same

time a subpoena was served on Grand Maison De Parfums, Inc. On July 14, 1970, the petitioner told Perlow that he was about to receive $25,000.00 to $30,000.00 from the settlement of an action and that he would arrange to settle the judgment.

The petitioner failed to attend the examinations scheduled.

At no time during the pendency of the various judgment enforcement proceedings did Vivaudou deny his knowledge of the judgment or the service of the summons and complaint in the action.

The petitioner's challenge to the jurisdiction of the Court appeared for the first time in the affidavit and order to show cause dated in November 1970 when the petitioner made an application in the New York Supreme Court to vacate and set aside the judgment entered against him.

The petitioner in his affidavit made in November 1970 denied having been served with process. The petitioner did not dispute the fact that he became aware of the judgment against him upon the service of the subpoena and notice in January, 1967. For four years after such notice the petitioner negotiated with the respondent's attorney, signed stipulations adjourning examinations, was served with additional papers, wrote letters, and had meetings with respondent's attorney. At no time during the four years did he dispute the service of the summons and complaint upon him. It was not until November 1970 that mention was made of lack of jurisdiction of the Court. At the time of the service of the order to show cause to vacate the judgment thirteen years had elapsed since the entry of

the judgment and four years since the institution of proceedings to enforce payment of the judgment.

The petitioner's allegation on page 7 of the petition herein that he "showed that on April 3, 1957 and for several months prior thereto he resided in Puerto Rico" is not the fact. To support his allegations concerning residence in Puerto Rico he annexed to his affidavit "copies" of letters which he stated were sent by him from Puerto Rico and which letters were allegedly dated April 2, 1957 and April 8, 1957. In the petitioner's brief on his appeal to the Appellate Division it was stated that one of the said exhibits "was only a xerox copy of a copy of the original letter" and the admitted change as to date appearing thereon was "merely a writing over to prepare for the making of a clearing xerox copy."

Apparently, the Supreme Court gave little credence to the petitioner's claim of non-service and his specious "documentary proof." On the other hand, the respondent's evidentiary facts showed conclusively that the challenge to the jurisdiction of the Court was an afterthought which did not and could not impress the Court.

ARGUMENT

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

The petitioner having moved to vacate the judgment in the New York Supreme Court and such motion having been denied, cannot attack the judgment. The petitioner having been defeated as to the issue of service of process, is concluded and cannot raise it again collaterally. The petitioner tendered the jurisdiction fact controversy to the New York courts, and having lost, he is not free to use the same contention again. *Vander* v. *Casperson,* 12 N.Y.2d 36, 236 N.Y.S.2d 33.

Schwaimm v. *Davis,* 18 A.D.2d 1070, 239 N.Y.S.2d 579.

The principles of res judicata apply in this case and the question of jurisdiction of the New York Supreme Court has been fully and completely litigated and the question of jurisdiction is immune from collateral attack.

The leading case with the facts almost identical to those presented in this case is *American Surety Co.* v. *Baldwin,* 287 U.S. 156 where the opinion of this Court was delivered by Mr. Justice Brandeis. The reasons given by Mr. Justice Brandeis in his opinion, are wholly applicable to the situation here at hand.

On pages 165-166 it was stated:

> "The Supreme Court of Idaho had jurisdiction over the parties and of the subject matter in order to determine whether the trial court had jurisdiction. Clearly, the motion to vacate, made on a general ap-

pearance, and the appeal from the order thereon, were no less effective to confer jurisdiction for that purpose than were the special appearance and motion to quash and dismiss held sufficient in *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522. And there was an actual adjudication in the state court of the question of the jurisdiction of the trial court to enter judgment. The scope of the issues presented involved an adjudication of that issue. Compare *Napa Valley Elec. Co.* v. *Railroad Commn.*, 251 U.S. 366; *Grubb* v. *Public Utilities Commn.*, 281 U.S. 470, 477-478. The Supreme Court of Idaho did not refuse to adjudicate that question when it declined to 'construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment thereon.' It narrowed the issue, according to the State procedure, by separating, in effect, the question of jurisdiction from that of liability. It held that the status of the Surety Company as a party to the litigation, by virtue of its execution of the bond in the cause, necessarily persisted, although its liability may have been limited by the terms of the bond. With the soundness of the decision we are not here concerned. It is enough that the court did not, as the Surety Company asserts, reach its decision by merely assuming the point in issue, or by deeming itself concluded by the fact that the trial court took jurisdiction. That it did not so reach its decision is made clear by the opinion itself. We are thus brought to a consideration of the effect on the present suit of the judgment of the Supreme Court of Idaho.

The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1790, c. 11; Act of March 27, 1804, c. 56, §2; Rev. Stat. §905; *Mills* v. *Duryee*, 7 Cranch 481, 485; *Insurance Co.* v. *Harris*, 97 U.S. 331, 336. Compare *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 155. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See *Marshall* v. *Holmes*, 141 U.S. 589, 596; *Fidelity & Deposit Co.* v. *Gaston, Williams & Wigmore*, 13 F.(2d) 267, aff'd per curiam, *id.*, 268. The principles of *res judicata* may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata*, and precludes a suit to enjoin enforcement of the judgment. *Bernhard* v. *Idaho Bank & Trust Co.*, 21 Idaho 598; 123 Pac. 481. Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment

for want of jurisdiction. Cf. *Fidelity Nat. Bank & Trust Co.* v. *Swope*, 274 U.S. 123, 130-131."

Moore's Federal Practice, Sec. 60.37(3) 77 A.L.R. 2d 1425.

The denial of the petitioner's motion to vacate the judgment in the State Court did not deprive the petitioner of any constitutional right.

The case of *Freyberger* v. *N. W. Harris Co.*, 273 N.Y. 115; 6 N.E.2d 398, is much in point to the instant case. There the Court in refusing to entertain an appeal where the appellant claimed that the Court had jurisdiction because there was involved a question of the constitutions of the State and the United States, said:

"The alleged constitutional question directly involved is that the judgment violates the Fourteenth Amendment to the United States Constitution, for the reason that the decision and judgment are not responsive to the issues; that the court failed to give due weight to the evidence produced by appellant; and that the court acted arbitrarily in applying erroneous principles of law. Appellant made a motion for a new trial, in which he stated: 'That the findings in favor of defendants, the decision and judgment of the Court deprive plaintiff of his property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States and of article 1, section 6, of the Constitution of the State of New York."

The gist of his claim is that the judgment granted by the Special Term and unanimously affirmed by the Appellate Division is wrong, and that he has been deprived of

his property without due process of law. We are unable to see that there is any constitutional question directly involved on this appeal. Appellant has had his day in court; has had a trial lasting about nine days; and all issues which the court decided relevant under the applicable rules of law have been decided by the court in a decision which contains over a hundred findings of fact.

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States." *Bonner* v. *Gorman,* 213 U.S. 86, 91, 29 S. Ct. 483, 485, 53 L. Ed. 700.

In 47 Am. Jur. 2nd on page 275 it is stated:

§1289. *State court judgments in federal courts.*

The Constitution of the United States provides that full faith and credit shall be given "in each state" to the public acts, records, and judicial proceedings of every other state. Although judicial proceedings in the federal courts are not explicitly included within such provision it is to be noted that the federal statute enacted pursuant thereto provides that the properly authenticated records and judicial proceedings shall have full faith and credit "in every court within the United States." This statute has been held to extend the rule of the Constitution to federal courts, so that a federal court sitting in a state is bound equally with the courts of the state to observe the command of the full faith and credit clause. Hence, a federal court will accord to a judgment of a state court the

same effect as is given to it by the court of the state in which it is rendered.

Thus, it may be observed that a judgment of a state court having the requisite jurisdiction will operate as res judicata and a bar in a federal court. This rule has even been applied to a state court's erroneous adjudication of a federal question, which is a bar to a subsequent litigation of such question between the same parties in a diversity case in a federal court.

There appears to be no special or important reasons why consideration should be given to the petition for a writ herein in view of the provisions of Supreme Court Rule 19. In fact, the petition is wholly lacking in merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, May 2, 1972.

Respectfully submitted,

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